A **GOLDEN APPROACH SDN BHD v. LAU SEN LEONG & ANOR**

COURT OF APPEAL, PUTRAJAYA
NALLINI PATHMANATHAN JCA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
B [CIVIL APPEAL NO: W-04(IM)(NCVC)-105-03-2018]
11 JANUARY 2019

CONTRACT: *Agreement – Breach – Parties entered into sale and purchase agreement for sale of property – Delay in delivery of vacant possession – Claim for*
C *liquidated damages – Whether claim filed within time – When cause of action accrued – Limitation Act 1953, s. 6(1)*

LIMITATION: *Cause of action – Accrual – Parties entered into sale and purchase agreement for sale of property – Delay in delivery of vacant possession – Claim for*
D *liquidated damages – Whether claim filed within time – When cause of action accrued – Limitation Act 1953, s. 6(1)*

Pursuant to a sale and purchase agreement ('SPA'), the first respondent and one Lau Kim Swee ('the deceased') had purchased a piece of land with vacant possession, together with a bungalow to be erected on two pieces of land,
E from the appellant, at the purchase price of RM233,600. When the deceased passed away, his estate was represented by the second respondents. The delivery of the vacant possession of the property was only effected on 14 March 2016. There had been a delay in delivering the vacant possession, by the appellant, from 3 August 1998 until 14 March 2016. The respondents
F claimed for liquidated damages, in the sum of RM411,456, against the appellant but the latter refused to pay the said sum. This prompted the respondents to commence an action at the Sessions Court, against the appellant, based on a breach of contract. Resisting the claim, the appellant submitted that the respondents' action, which was filed on 15 March 2017, was out of time pursuant to s. 6(1) of the Limitation Act 1953 ('the Act'),
G as the cause of action accrued at the time when the breach occurred, namely 3 August 2004. The respondents argued that their action accrued from the day when they were given vacant possession of the property on 14 March 2016. The respondents proceeded to file an application for summary judgment, under O. 14 r. 1 of the Rules of Court 2012 ('ROC'). The Sessions
H Court allowed the respondents' claim and entered summary judgment against the appellant for the sum of RM411,456 with costs. The decision was affirmed by the High Court. In arriving at their respective decisions, the Sessions Court and High Court Judges had distinguished the case of *Insun Development Sdn Bhd v Azali Bakar* ('the *Insun* case') with the present case and
I held that the determination of the *Insun* case of when the cause of action accrued was inapplicable due to the differences in the relevant clauses in the SPA relating to delivery of vacant possession. Hence, the present appeal.

Held (allowing appeal)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) Both the SPAs in the *Insun*'s case and the present appeal were in the form as prescribed by the Housing Developers (Control and Licensing) Regulations ('the Regulations'), which were enforced at the material time. In the *Insun* case, it was the Regulations 1982 while in the present appeal, it was the Regulations 1989. The Sessions Court and High Court Judges erred when they distinguished the SPA in the present appeal with the *Insun* case based on the presence of the addendum in cl. 20(2) of the SPA which was absent in cl. 18(2) of the SPA in the *Insun* case. The addendum was not material and neither was it crucial to the extent that it affected or altered the meaning of the clause in the SPA concerned. (paras 41 & 42)

(2) The *Insun* case was a Federal Court case, which is the highest court in the land and binding on all courts. The High Court was bound by the doctrine of *stare decisis* to follow the principle enunciated in the *Insun* case. Therefore, the *Insun* case applied and the respondents' right of action to claim for liquidated and ascertained damages accrued on the date of the breach, namely the day after the time limited under cl. 20(2) of the SPA of delivery of vacant possession on 4 August 1998. As the respondents' cause of action was founded on contract, the limitation period was governed by s. 6 of the Act, which is six years from the date of the breach. The last date for the respondents to bring an action against the appellant for the breach of cl. 20(2) of the SPA was 3 August 2004. The respondents' claim was out of time as the action was filed on 15 March 2017. As limitation had set in, the respondents were not entitled to summary judgment. The summary judgment was thus set aside. The court invoked its powers under O. 14A of the ROC and ordered that the claim be struck out. (paras 51-53 & 56)

Bahasa Malaysia *Headnotes*

Susulan satu perjanjian jual beli ('PJB'), responden pertama dan seorang yang bernama Lau Kim Swee ('si mati') telah membeli sebidang tanah dengan milikan kosong, bersama-sama sebuah banglo yang akan dibina atas dua bidang tanah, daripada perayu, dengan harga belian sebanyak RM233,600. Apabila si mati meninggal dunia, harta pusakanya diwakili oleh responden-responden kedua. Penyerahan milikan kosong berkuat kuasa pada 14 Mac 2016. Berlaku kelewatan menyerahkan milikan kosong, oleh perayu, dari 3 Ogos 1998 hingga 14 Mac 2016. Responden-responden menuntut ganti rugi jumlah tertentu, berjumlah RM411,456, terhadap perayu tetapi perayu enggan membayar jumlah tersebut. Ini menyebabkan responden-responden memulakan satu tindakan, di Mahkamah Sesyen, terhadap perayu berdasarkan pelanggaran kontrak. Membantah tuntutan tersebut, perayu menghujahkan bahawa tindakan responden-responden, yang difailkan pada 15 Mac 2017, adalah di luar had masa bawah s. 6(1) Akta Had Masa 1953

A ('Akta'), kerana kausa tindakan terakru semasa pelanggaran berlaku, iaitu pada 3 Ogos 2004. Responden-responden menegaskan bahawa tindakan mereka terakru pada hari mereka diberi milikan kosong hartanah tersebut, iaitu pada 14 Mac 2016. Responden-responden seterusnya memfailkan permohonan penghakiman ringkas, bawah A. 14 k. 1 Kaedah-kaedah
B Mahkamah 2012 ('KKM'). Mahkamah Sesyen membenarkan tuntutan responden-responden dan merekodkan penghakiman ringkas terhadap perayu untuk jumlah RM411,456 dengan kos. Keputusan ini disahkan oleh Mahkamah Tinggi. Dalam mencapai keputusan mereka, Hakim Mahkamah Tinggi dan Mahkamah Sesyen membezakan kes *Insun Development Sdn Bhd*
C *v. Azali Bakar* ('kes *Insun*') dengan kes ini dan memutuskan pemutusan kes *Insun* tentang bila kausa tindakan terakru tidak terpakai kerana perbezaan dalam klausa-klausa relevan dalam PJB berkenaan penyerahan milikan kosong. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)

D **Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:**

(1) Kedua-dua PJB dalam kes *Insun* dan kes ini adalah dalam bentuk yang diperuntukkan oleh Peraturan-peraturan Pemaju Perumahan (Kawalan dan Pelesenan) ('Peraturan-peraturan'), yang berkuat kuasa pada masa
E itu. Dalam kes *Insun*, Peraturan-peraturan 1982, manakala dalam rayuan ini, Peraturan-peraturan 1989. Hakim Mahkamah Sesyen dan Mahkamah Tinggi terkhilaf apabila membezakan PJB dalam rayuan ini dengan kes *Insun* berdasarkan kewujudan adendum dalam kl. 20(2) PJB yang tidak wujud dalam kl. 18(2) kes *Insun.* Adendum tersebut tidak
F material mahupun penting hingga menjejaskan atau mengubah maksud klausa dalam PJB berkenaan.

(2) Kes *Insun* ialah kes Mahkamah Persekutuan, iaitu mahkamah tertinggi di negara ini dan mengikat semua mahkamah. Mahkamah Tinggi terikat dengan doktrin *stare decisis* untuk mengikut prinsip yang diperuntukkan
G dalam kes *Insun.* Oleh itu, kes *Insun* terpakai dan hak-hak tindakan responden-responden untuk menuntut ganti rugi jumlah ditetapkan dan ditentukan terakru pada tarikh pelanggaran, iaitu sehari selepas masa yang dihadkan bawah kl. 20(2) PJB untuk penyerahan hak milik pada 4 Ogos 1998. Oleh kerana kausa tindakan responden-responden
H berasaskan kontrak, had masa dikawal oleh s. 6 Akta, iaitu enam tahun dari tarikh pelanggaran. Tarikh akhir untuk responden-responden memulakan tindakan terhadap perayu berikutan pelanggaran kl. 20(2) PJB ialah 3 Ogos 2004. Tuntutan responden-responden di luar had masa kerana tindakan tersebut difailkan pada 15 Mac 2017. Oleh kerana had
I masa telah bermula, responden-responden tidak berhak mendapat penghakiman ringkas. Penghakiman ringkas diketepikan. Mahkamah membangkitkan kuasa-kuasanya bawah A. 14A KKM dan memerintahkan agar tuntutan dibatalkan.

Case(s) referred to:

Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal [2006] 1 CLJ 577 FC ***(refd)***
Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 SC ***(foll)***
Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC ***(refd)***
Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 56(3)
Housing Development (Control and Licensing) Regulations 1989, Schedule G, cl. 24(4)
Housing Developers (Control and Licensing) Rules 1970, r. 12(1)(r)
Limitation Act 1953, s. 6(1)(a), (3)
Rules of Court 2012, O. 14A rr. 1, 2, O. 14 r. 1

For the appellant - Wong Chong Wah, ET Low, Wong Chun-Keat, Jeremy Low, Chan Pei Mun; M/s Cheong Wai Meng & Van Buerle
For the respondents - Chan Chee Leong; M/s CL Chan & Ng

[Editor's note: For the High Court judgment, please see Golden Approach Sdn Bhd v. Lau Seng Leong & Anor [2018] 1 LNS 407 (overruled).]

Reported by Najib Tamby

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appellant, Golden Approach Sdn Bhd (defendant in the Sessions Court and hereinafter referred to as "Golden Approach") appeals against the decision of the learned High Court Judge in dismissing Golden Approach's appeal. The learned High Court Judge had dismissed Golden Approach's appeal, and affirmed the decision of the Sessions Judge who had allowed summary judgment by the respondents herein (plaintiffs in the Sessions Court) to be entered against Golden Approach.

[2] In this judgment, we will refer to the appellant as "Golden Approach" and the respondents as "the plaintiffs".

Background

[3] The undisputed facts are as stated by the plaintiffs in their written submission which, to a certain extent is reproduced herein.

[4] Pursuant to a sale and purchase agreement dated 4 August 1995 ("SPA") Lau Sen Leong (the first plaintiff) and one Lau Kim Swee, had purchased all that piece of land with vacant possession known as Plot/Lot No. 0010 together with a bungalow to be erected on two pieces of land known as HS(D) BP 394, Lot No. 4020 and HS(D) BP 395, Lot No. 4021, both in Mukim Ulu Bernam, Daerah Batang Padang, Negeri Perak ("the property") from Golden Approach, a housing developer licensed under the Housing Development (Control and Licensing) Act 1966, at a price of RM233,600.

[5] The SPA was in the form prescribed in Schedule G to the Housing Development (Control and Licensing) Regulations 1989 as was then in operation.

[6] One of the purchasers, Lau Kim Swee ("the deceased"), passed away on 6 August 2012. The deceased's estate is now represented by Sim Kum Ying and Lau Sen Hock as joint administrators of the estate of the deceased. They are named as the second plaintiffs in the Sessions Court.

[7] Clause 20 of the SPA provides for the deadline for Golden Approach to hand over vacant possession of the property to the plaintiffs. It reads as follows:

> 20. Time for handing over of vacant possession
>
> 1) Vacant possession of the said Building to which water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement; and
>
> 2) If the Vendor fails to deliver hand over possession of the said Building, to which water and electricity supply are ready for connection to the said Building, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchaser price.

[8] It is undisputed that the delivery of vacant possession of the property was only effected on 14 March 2016. There had been a delay from 3 August 1998 until 14 March 2016 on the part of Golden Approach in delivering vacant possession of the same.

[9] By letters of demand dated 28 December 2016 and 11 January 2017, the plaintiffs *vide* their solicitors, Messrs C.L. Chan & Ng claimed for liquidated damages in the sum of RM411,456 against Golden Approach.

[10] Golden Approach *vide* its solicitors Messrs Cheong Wai Meng & Van Buerle's letter dated 26 January 2017, refused to pay the liquidated damages claimed by the plaintiffs and contended that the plaintiffs' claim was time barred.

The Issue

[11] The cause of action is premised on breach of contract, namely the SPA. The bone of contention between the plaintiffs and Golden Approach is the date of the accrual of the right to sue for the liquidated and ascertained damages.

[12] It is the plaintiffs' case that the cause of action only accrued at the time when the plaintiffs took over vacant possession of the property, namely on 14 March 2016. That was when time starts to run. In this respect, the plaintiffs submitted that the principle in the Privy Council case of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1 applies.

[13] Whilst Golden Approach's stand is that the cause of action accrued at the time when the breach occurred, namely 3 August 2004. Therefore, by filing the suit against Golden Approach on 15 March 2017, clearly the plaintiffs' action is out of time pursuant to s. 6(1) of the Limitation Act 1953.

The Sessions Court Proceedings

[14] It is undisputed that the plaintiffs filed their claim in the Sessions Court on 15 March 2016 against Golden Approach for liquidated damages in the sum of RM411,456 pursuant to cl. 20 of the SPA.

[15] Golden Approach in its defence, pleaded that the plaintiffs' claim was barred by s. 6(1) of the Limitation Act 1953. It was Golden Approach's contention that as the plaintiffs' claim was founded upon a breach of cl. 20 of the SPA, their cause of action accrued on the day following the time limited for delivery of vacant possession of the property, namely on 4 August 1998 which expired on 3 August 2004 by virtue of s. 6(1) of the Limitation Act 1953. The plaintiffs only filed their writ of summons and statement of claim on 3 April 2017, which is more than 12 years out of time.

[16] The plaintiffs' stand is that their action accrued from the day when they were given vacant possession of the property on 14 March 2016.

[17] On 4 April 2017, the plaintiffs filed an application for summary judgment under O. 14 r. 1 of the Rules of Court 2012 in the Sessions Court ("ROC 2012").

[18] Golden Approach in resisting the O. 14 application, contended that the plaintiffs' claim was barred by limitation by virtue of s. 6(1)(a) of Limitation Act 1953.

[19] On 31 May 2017, the Sessions Court Judge allowed the plaintiffs' application to enter summary judgment against Golden Approach for the sum of RM411,456 with costs of RM3,000. The Sessions Court held *inter alia*, that:

(i) In determining when the right to sue accrued, *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 ("*Insun*") was distinguished and the principle stated in the case of *Loh Wai Lian v. SEA Housing Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1 ("*Loh Wai Lian*") was relevant and applicable in this case;

(ii) The court took judicial notice of cl. 24(4) in Schedule G to the Housing Development (Control and Licensing) Regulations 1989 which is in operation and ought to be read into the existing SPA. The said cl. 24(4) expressly provides that any cause of action to claim liquidated damages shall be paid by the vendor to the plaintiffs immediately upon the date the purchaser takes vacant possession of the property;

(iii) Hence, the plaintiffs' claim was not barred by the statutory limitation under s. 6(3) of the Limitation Act 1953 as time started to run on the date the plaintiffs took vacant possession of the property which was on 14 March 2016; and

(iv) In the premise, summary judgment was entered against Golden Approach, with costs of RM3,000.

[20] Dissatisfied with the Sessions Court's judgment, Golden Approach on 2 June 2017 filed an appeal in the High Court.

Decision Of The High Court

[21] The appeal was heard on 9 October 2017 by the High Court and the same was dismissed.

[22] In dismissing the appeal, the High Court affirmed the decision of the Sessions Court and held in particular:

(i) *Insun*'s case is inapplicable and ought to be distinguished because of the following differences:

(a) Clause 20(2) of the SPA in our present case has an addendum of the words "to deliver hand over possession" whereas cl. 18(2) of the SPA in the *Insun*'s case used the phrase "to deliver vacant possession". There is another addendum in cl. 20(2) of the SPA in our case which is, "to which water and electricity supply are ready for connection to the said building" which was absent in cl. 18(2) of the SPA in the *Insun*'s case;

(b) unlike *Insun*'s case, the plaintiffs in the instant appeal vigorously pursued Golden Approach to hand deliver and hand over vacant possession of the property as soon as the time stipulated for delivery of vacant possession has been reached; and

(c) if the plaintiffs filed their claim against Golden Approach at the time of breach on 4 August 1998, the liquidated damages cannot be ascertained, until the building has been completed and possession can be delivered.

[23] The learned High Court Judge held that, in applying cl. 24(4) of Schedule G to the Housing Development (Control and Licensing) Regulations 1989 into clause of 20(1) and (2) of the SPA, the Sessions Judge had misdirected himself as the said cl. 24(4) was not enforced yet at the time when the SPA was executed. The Sessions Judge erred when he took judicial notice of cl. 24(4) of the said Schedule G to the Housing Development (Control and Licensing) Regulations 1989. We noted that this is no longer an issue before us, hence we do not address it in our judgment.

[24] In any event, the learned High Court Judge found that Golden Approach has failed to raise triable issues in its defence, the appeal was accordingly dismissed by the High Court.

Our Decision

[25] Golden Approach had not disputed on two salient points, namely:

(i) The period of delay by Golden Approach in handing over vacant possession of the property to the plaintiffs from 4 August 1998 until 14 March 2016 (6,429 days); and

(ii) The computation that Golden Approach, as the developer, was liable to pay to the plaintiffs as the purchasers, the liquidated damages as provided by the sale and purchase agreement dated 4 August 1995 ie, purchase price of RM233,600 x 10% annual interest x 6419 days (from 4 August 1998 till 14 March 2016) = RM411,456 and cost of RM3,000.

[26] The issue only revolves on one pertinent issue, namely, whether the plaintiffs' claim against the defendant, was barred by s. 6(1) of the Limitation Act 1953.

[27] The Sessions Judge and the learned High Court Judge had distinguished *Insun*'s case with the present case and held that *Insun*'s determination of when the cause of action accrued is inapplicable due to the differences in the relevant clauses in the SPA with regards to delivery of vacant possession. We, however disagreed with the findings of both courts as to when the action accrued. It is our view that the principle in determining when the cause of action accrued as set out in *Insun*'s case is applicable. These are our reasons.

[28] The Federal Court case of *Insun* was similar and on all fours with our present appeal. It was an appeal from the judgment of the High Court, ordering that judgment be entered in favour of the plaintiff, the purchaser under a sale and purchase agreement dated 12 December 1984 of a property to be erected by the defendant, Insun Development Sdn Bhd, the vendor. The agreement was in the form prescribed in the Schedule to the Housing Developers (Control and Licensing) Regulations 1982 (the 1982 Regulations).

[29] The purchaser's claim was for a declaration as to entitlement to agreed liquidated damages for breach of contract, calculated at the rate of 10% per annum on a daily basis on the purchase price of RM49,725 from 12 December 1986 to date of delivery of possession of the property. Alternatively, the purchaser's claim was for a declaration as to entitlement to liquidated damages as aforesaid, under the Housing Development (Control and Licensing) Act 1966 and the regulations made thereunder, *to wit*, the 1982 Regulations. The case was decided on similar issues as our present appeal, namely whether the purchaser's right to sue for the agreed liquidated damages accrued the day after the time limited under the agreement for delivery of vacant possession or it accrued upon actual delivery of vacant possession. The learned judge held that the purchaser was entitled to the primary declaration prayed for and accordingly entered judgment in his favour.

[30] What is pertinent is the provision of cl. 18 of the SPA in *Insun* which reads:

> 18 (1) The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.

A (2) If the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[31] It was undisputed that the property was not completed and available B for delivery until 25 March 1994. There has been a delay from 12 December 1986 until 25 April 1994, on the part of the vendor in delivering vacant possession of the same.

[32] A demand for agreed liquidated damages by the purchaser was refused by the vendor, which resulted in the former filing an originating summons C for the declarations aforesaid and for consequential reliefs.

[33] It was the vendor's stand that the purchaser's claim was barred by s. 6(1) of the Limitation Act 1953. It was contended that as the purchaser's claim was premised upon a breach of contract, namely cl. 18 of the SPA, his cause of action accrued on the day following the time limited under the D agreement for completion and delivery of vacant possession of the house. Based on this ground, the purchaser had commenced the proceedings against the vendor more than seven months out of time and his claim was therefore barred by limitation.

E **[34]** In giving judgment for the purchaser, the judge relied heavily on the Privy Council decision in *Loh Wai Lian v. SEA Housing Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1. The point of central importance is whether *Insun*'s case is governed by the judgment of the Privy Council in *Loh Wai Lian*, as the judge thought.

F **[35]** In *Loh Wai Lian*'s case, by a contract in writing dated and executed on 18 March 1974, the purchaser had agreed to purchase from the defendant/ developer – a corporate licensed housing developer, a shophouse to be constructed by the developer. Clause 17 of the SPA provided as follows:

Subject to clause 32 hereof and/or to any extension, or extensions of time G as may be allowed by the controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this agreement. Provided always that if the said building is not completed and ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidated damages calculated from day to day at the H rate of eight per centum (8%) per annum on the purchase price of the said property from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

[36] The applicable legislation in *Loh Wai Lian* was the Housing Developers (Control and Licensing) Rules 1970 ("the 1970 Rules") r. 12(l) I of which provided:

Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely: ...

[37] There were then set out twenty-one matters which were required to be incorporated in the contract of sale, the relevant ones for purposes of the case were as follows:

> (o) Provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall be not later than 18 months after the date of signing of the contract of sale ...
>
> (r) Provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale ...

[38] What is pertinent to take note is that cl. 17 provided a formula for the computation of the agreed liquidated damages which defined not only its *terminus a quo* (its opening date) but also its *terminus ad quem* (its closing date).

[39] In *Loh Wai Lian*, there had been a delay in the completion of the shophouse and it was in fact completed only on 7 November 1977. The purchaser demanded for liquidated damages for the late delivery, to which the vendor refused which resulted in the purchaser commencing an action against the vendor for liquidated damages for breach of contract. The purchaser succeeded in its O. 14 application before the SAR. On appeal before the judge in chambers, the developer contended that the purchaser's claim was barred by limitation by virtue of s. 6(1) of the Limitation Ordinance 1953. The learned judge upheld the contention and set aside the summary judgment. The purchaser further appealed to the Federal Court where the Federal Court dismissed the appeal and held that the claim by the purchaser was statute barred. The purchaser appealed to The Privy Council which held that:

> (2) the only sensible construction of clause 17 is that it imposes an obligation to pay in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for;

The Privy Council restored the order of the SAR.

[40] Coming back to our present appeal, was the Sessions Judge and the learned High Court Judge correct in distinguishing *Insun*'s case due to cl. 20(2) of the SPA which provides for the following addendum which was markedly absent in the SPA in *Insun*'s case:

(i) "to deliver hand over possession"; and

(ii) "to which water and electricity supply are ready for connection to the said Building."

[41] Both of the SPAs in *Insun* and our present appeal are in the form as prescribed by the Housing Development (Control and Licensing) Regulations which are enforced at the material time. In *Insun*'s case it was the Housing Developers (Control and Licensing) Regulations 1982, whilst in the present appeal it is the Housing Development (Control and Licensing) Regulations 1989.

[42] We agreed with the submission by Golden Approach that the Sessions Judge and the learned High Court Judge had erred when they had distinguished the SPA in the present appeal with *Insun*'s case based on the presence of the addendum in cl. 20(2) of the SPA which was absent in cl. 18(2) of the SPA in the *Insun*'s case and submitted that the principle as laid down in *Loh Wai Lian* is applicable.

[43] In our view, that addendum was not material and neither was it crucial to the extent that it affected or altered the meaning of the clause in the SPA concerned. What needs to be considered is the obvious and most material difference between the two SPAs. As in *Insun*'s case, Edgar Joseph Jr FCJ addressed what ought to be considered in determining the date of the accrual of the right to sue for damages. In the process His Lordship had distinguished the provisions of the SPA in *Loh Wai Lian* with the one in *Insun*. His Lordship explicitly in his judgment said as follows:

> It is clear law, that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract (See *Nasri v. Mesah* [1970] 1 MLJ 32, 34; *Reeves v. Butcher* [1891] 2 QB 509, 511; *Gibbs v. Guild* [1881] 8 QBD 296, 302). *But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages which, of course, was what had happened in Loh Wai Lian.*
>
> In the present context, we have to consider whether there is any, and if so, *what material difference* between the contract of sale in *Loh Wai Lian* and the agreement here.
>
> *The obvious difference between the contract of sale in Loh Wai Lian and the agreement here, which we consider to be most material, is this: under the former, the statutory formula for the calculation of the indemnity was modified by expressly stating not only the terminus a quo (the opening date) but also the terminus ad quem (the closing date), which was the date of actual completion and delivery, of possession, whereas under the latter, although there is, by clause 18(2), also a formula for the calculation of liquidated damages, it only specifies the terminus a quo but not the terminus ad quem. In our view, this difference is a matter of critical substance.*
>
> It is obvious from the judgment of the Privy Council in *Loh Wai Lian*, that but for the unusual language of clause 17 of the contract of sale, which had provided a formula for the computation of damages payable by the developer to the buyer for delays, by defining not merely the *terminus a quo* (the opening date) required under r. 12(l)(r) of the 1970 Rules but also the *terminus ad quem* (the closing date) – not required under r. 12(l)(r) – the case would have been differently decided for their Lordships said this:

> If the question is asked 'in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?', the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered.

In our view, for the reasons stated, *Loh Wai Lian* is, therefore, readily distinguishable from the present case, and accordingly, the Judge was, with respect, wrong in holding that it was of decisive importance to the question which arose for decision.

It follows, therefore, that our answer to the crucial question aforesaid is; because the agreement by clause 18(2) had provided for a formula for the calculation of liquidated damages which defined the *terminus a quo* (the opening date) but not the *terminus ad quem* (the closing date), the purchaser's right of action for damages for breach of contract, following the general rule, accrued on the date of the breach, which in this case was the day after the time limited under clause 18(2) for the delivery of vacant possession, that is to say, on 12 December 1986. Accordingly, the purchaser having commenced proceedings only on 31 July 1993, was more than seven months out of time. We are thus driven to the inevitable conclusion that the purchaser's claim was statute-barred under the provisions of s. 6(1) of the Limitation Act, 1953.

[44] Thus, applying the principle as enunciated by the Federal Court in *Insun*'s case, the alleged difference in the addendum in the SPA in our present appeal and the SPA in *Insun*'s case, (as stated by the Sessions Judge and the learned High Court Judge), is not a matter of critical substance which should be considered by the learned judge in determining when the cause of action accrued. Hence the Sessions Judge and the learned High Court Judge had considered irrelevant considerations in determining the date of the accrual of the right to sue for damages.

[45] Unlike *Loh Wai Lian*, which is distinguishable with our present appeal, namely that, in *Loh Wai Lian*, cl. 17 of the SPA had provided a formula for the computation of damages payable by the developer to the buyer for delays, by defining not merely the *terminus a quo* (the opening date) required under r. 12(l)(r) of the 1970 Rules but also the *terminus ad quem* (the closing date). Whereas in our present appeal, the SPA by cl. 18(2) had provided for a formula for the calculation of liquidated damages which defined the *terminus a quo* (the opening date) but not the *terminus ad quem* (the closing date), the plaintiffs' right of action for damages for breach of contract, following the general rule, accrued on the date of the breach. In our case, it was the day after the time limited under cl. 18(2) for the delivery of vacant possession, namely on 3 August 2004. Accordingly, the plaintiff having

commenced the suit against Golden Approach only on 15 March 2017, was certainly out of time. Inevitably, the plaintiffs' claim was statute-barred under s. 6(1) of the Limitation Act 1953.

[46] The second ground relied upon by the learned High Court Judge to distinguish *Insun* and our present appeal is that the purchasers in our present appeal had pursued vigorously against Golden Approach to hand deliver and hand over vacant possession of the property. The purchasers submitted that they had conformed with s. 56(3) of the Contracts Act 1950 which provides that:

> 56(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise on any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the acceptance, he gives notice to the promisor of his intention to do so.

[47] This section, in our view is immaterial and ought not be a basis of distinguishing the case with *Insun* and neither could it be a basis to extend the time as stipulated under the Limitation Act 1953.

[48] Thirdly, the plaintiffs submitted that they would not be able to calculate liquidated damages if they proceeded in filing their claim at the time of breach on 4 August 1998. In other words, the contention of the plaintiffs is that the cause of action would not be complete until the property was actually completed and vacant possession given to the plaintiffs. However, we are of the view that it would not be correct to say that the cause of action would shift because they could not calculate liquidated damages if they were to file their claim at the time of breach, as there was no delivery at the time of the breach. The issue on hand is when the cause of action accrued. It ought not be confused with the reliefs claimed.

[49] The plaintiffs failed to see that this precise and specific issue has already been addressed by the Federal Court in *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1984] 2 CLJ 160; [1984] 1 CLJ (Rep) 223; [1984] 2 MLJ 280 whereby Mohamed Azmi FCJ held at p. 227 (CLJ); p. 283 (MLJ) para. C:

> Such a proposition would in fact mean that if the respondents did not complete the shophouse, accrual of cause of action could be postponed indefinitely. We do not think that the proviso to cl. 17 of the agreement could have that effect on the Limitation Ordinance in an action founded on contract. A distinction must clearly recognised between a cause of action and the relief claimed. The date of completion of the shophouse was only necessary to quantify the maximum relief under cl. 17 which could be done subsequently by evidence. It could not constitute an impediment to the cause of action being complete. The breach had occurred on 18 September 1975 giving rise to a complete cause of action, and the accrual of cause of action would not be postponed by temporary lack of evidence pertaining to maximum relief claimable resulting from

such breach irrespective of whether the damages claimed were liquidated or unliquidated. In the circumstances of the present case, we would not agree to the proposition that the cause of action was not complete until the shophouse was completed.

[50] What is pertinent is to take note of what the Federal Court further held in this respect in *Loh Wai Lian* at p. 281:

(2) the appellant was wrong in thinking that her writ could not be issued until November 1977 because the liquidated damages could not be quantified. The agreement provided that such damages were to be calculated on a day to day basis from the date of breach with the date of actual completion to be used for the purpose of calculating the maximum days claimable. Damages could therefore be ascertained under the agreement and in this case if the statement of claim had been filed on or before September 17, 1981, no court would have struck it out as disclosing no cause of action merely because the maximum liquidated damages claimable was not quantified.

[51] It is also to be noted that *Insun*'s case is a Federal Court case, which is the highest court in the land and binding on all courts. The High Court is bound by the doctrine of *stare decisis* to follow the principle as enunciated in *Insun*. We could do no better than what had already been stated in the judgment of the Federal Court in *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577 which said:

It is axiomatic to state that the doctrine of *stare decisis* has become the cornerstone of the common law system practised in this country. It is fundamental to its existence and to the rule of law. It has attained the status of immutability. In *Public Prosecutor v. Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 277; [1980] 1 LNS 58, Mr. Justice Chang Min Tat had occasion to restate the doctrine in words which are poignantly clear when he said:

It is ... necessary to reaffirm the doctrine of *stare decisis* which the Federal Court accepts unreservedly and which it expects the High Court and other inferior courts in a common law system such as ours to follow similarly.

3. Judicial hierarchy must be observed in the interests of finality and certainty in the law and for orderly development of legal rules. as well as for the courts and lawyers to regulate their affairs. Failure to observe judicial precedents would create chaos and misapprehensions in the judicial system.

[52] Therefore based on the aforesaid, *Insun*'s case applies and the plaintiffs' right of action to claim for liquidated and ascertained damages accrued on the date of the breach, namely the day after the time limited under cl. 20(2) of the SPA of delivery of vacant possession on 4 August 1998.

[53] As the plaintiffs' cause of action was founded on contract, the limitation period is governed by s. 6 of the Limitation Act 1953, which is six years from the date of the breach. The last date for the plaintiffs to bring an action against Golden Approach for the breach of cl. 20(2) of the SPA is

A 3 August 2004. Clearly, the action herein was filed 15 March 2017 which is outside the limitation period as prescribed under s. 6(1) of the LA. Hence, the plaintiffs' claim is out of time.

[54] For the reasons as aforesaid, the learned judge had erred in distinguishing *Insun*'s case with the present appeal. The present SPA is similar to the one in *Insun*'s case. Therefore, as limitation has set in, the plaintiffs are not entitled to the summary judgment. The summary judgment is therefore set aside. The appeal is allowed with costs of RM10,000 to the appellant subject to allocatur and deposit refunded.

[55] Counsel for Golden Approach urged this court to invoke the powers under O. 14A of the ROC 2012 to strike out the claim as there is nothing left for this court to remit the case back to High Court.

[56] We agree with the contention of learned counsel for Golden Approach. In view that we have allowed the appeal, and the claim is barred by limitation, there is nothing left for the matter to be remitted back to High Court. We have decided on the question of law, namely on the limitation issue. We therefore invoke the powers under O. 14A and order that the claim be struck out (O. 14A r. 1 and O. 14A r. 2 of ROC 2012 referred).